Supreme Court, U.S.
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No. ____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2001

WILLIAM DANKS

Petitioner,

vs.

CLAUDE APPEL AND ROBERT HAEGER

Respondents

Petition for a Writ of Certiorari to the Presiding Disciplinary Judge of the Colorado Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Amendment's prohibition on prior restraints requires the vacating of an order prohibiting all disclosure of certain subpoenaed documents, where that order was entered against a person who did not initiate the subpoena, who was not a party to the proceeding in which the documents were subpoenaed, and who was provided the documents without any restriction on their use.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Office of Attorney Regulation Counsel of the Colorado Supreme Court was a party to the proceedings before the Presiding Disciplinary Judge.

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STATUTE

28 U.S.C. § 1257(a) 1

William Danks respectfully petitions for a writ of certiorari to review the order of the Presiding Disciplinary Judge of the Colorado Supreme Court in this case.

OPINIONS BELOW

The order and opinion of the Presiding Disciplinary Judge (App., *infra*, 1a) is unreported. The order of the Colorado Supreme Court denying Mr. Danks' petition for discretionary review (App., *infra*, 11a) is unreported, as is Mr. Danks' motion for reconsideration and to intervene in a petition for discretionary review by the Office Attorney Regulation Counsel (App., *infra*, 13a).

JURISDICTION

The Colorado Supreme Court denied Mr. Danks' petition for discretionary review on December 21, 2001 (App., *infra*, 11a), and denied a request for reconsideration of its denial. (App., *infra*, 13a). Colorado law does not provide any opportunity for review of the order at issue other than the (already twice denied) discretionary review by the Colorado Supreme Court. There is, therefore, no further opportunity for Mr. Danks to be heard on the matters raised in this Petition. Moreover, the order at issue in this case has no expiration date, and there is no indication that modification will be forthcoming. (App., *infra*, 9a). Thus, this case is final for purposes of establishing this Court's jurisdiction. *See Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 380, 312-13 n.5 (1968).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

INTRODUCTORY STATEMENT

For more than 125 days, Petitioner Danks has been silenced by order of a disciplinary officer of the Colorado Supreme Court. He has twice sought relief from the Colorado Supreme Court which has twice denied all relief without comment, in both instances within hours of the

filing of the request for relief.[1] Review by this Court is Mr. Danks' only hope for lifting the prior restraint which by its terms may otherwise remain in effect indefinitely.

The Court should grant a writ of certiorari to review the order of the Presiding Disciplinary Judge below for three reasons. First, the PDJ's order creates a prior restraint on Mr. Danks' speech, contrary to the First and Fourteenth Amendments and the decisions of this Court. Second, the PDJ's order effects a dramatic and unprincipled expansion of *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). Third, the PDJ's ruling conflicts with the long line of authority (including several cases by this Court) which hold that courts may not withdraw information from the public domain.

STATEMENT OF THE CASE

This case involves the legality of a prior restraint on Petitioner Danks' speech, and raises important questions about the scope of this Court's decision in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). The court below held that *Seattle Times* permits a "protective order" on materials obtained by subpoena, even when: (1) the person enjoined did not subpoena the documents in question; (2) the person enjoined was not a party to the proceeding; and (3) the person subject to the protective order held the materials free of any restriction on their use prior to the entry of the protective order.

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[1] Mr. Danks' first petition was denied on the second day following its filing. His petition for reconsideration was denied on the third working day following its filing.

In order to place this dispute in context, a brief history of the litigation follows: In March 2001, Colorado's Office of Attorney Regulation Counsel ("ORC") began an investigation of Petitioner William Danks, a Colorado attorney.[2] The investigation involved, *inter alia*, allegations that Petitioner Danks accused two sitting state court judges, Claude Appel and Robert Haeger, of serious misconduct. During the course of the investigation, ORC subpoenaed investigatory files from the FBI that contained information on the FBI's criminal investigation of Appel and Haeger. ORC sent Mr. Danks a copy of the FBI documents. Notably, ORC did *not* place any restriction on Mr. Danks' use of the documents.[3] Moreover, ORC did not subpoena the documents on behalf of Mr. Danks; rather; Mr. Danks learned of the subpoena only after it was issued.

Shortly after receiving the documents, Mr. Danks transmitted them to third parties, principally state officials, believing that the files suggested serious wrongdoing by Appel and Haeger (some of which occurred while the judges were acting in their judicial capacity).

Approximately two weeks *after* Mr. Danks received the documents (and after Mr. Danks had already transmitted the documents to the third parties), Appel and Haeger sought a protective order prohibiting Mr. Danks from further disseminating the FBI documents to anyone.

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[2] To date, this investigation has not proceeded beyond the investigatory stage.

[3] The body of the transmittal letter contained only one sentence: "Enclosed please find copies of the documents I received pursuant to the subpoena served on the FBI."

The Presiding Disciplinary Judge,[4] ("PDJ") charged with hearing such motions entered an interim protective order on October 20, 2001. After receiving briefs and hearing argument, the PDJ entered a permanent protective order on December 18, 2001, *nunc pro tunc*, November 27. The order prohibits Mr. Danks (and apparently everyone else) from disclosing "the FBI documents and the information contained therein . . . to any other person or entity without further Order of this Court." (App. *infra*, 9a). On December 21, 2001, the Colorado Supreme Court summarily and without explanation denied Mr. Danks' petition for discretionary review of the PDJ's order. On January 9, 2002, the Colorado Supreme Court denied Mr. Danks' motion for reconsideration, again without explanation, and on the same day, the court summarily denied Mr. Danks' motion to intervene in the ORC's petition for discretionary review of the same order of the PDJ.[5]

REASONS FOR GRANTING THE WRIT

The PDJ's Order Constitutes an Unconstitutional Prior Restraint on Petitioner's Speech

The PDJ's order creates an unconstitutional prior restraint on speech. Court injunctions against future speech – like the one at issue in this case – are paradigm prior restraints. *See, e.g.*, *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996). Indeed, in the

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[4] The Presiding Disciplinary Judge, an adjunct of the Colorado Supreme Court, is involved in various aspects of the Colorado attorney discipline process.

[5] The Colorado Supreme Court has not yet ruled on the ORC's petition for discretionary review.

proceedings below, respondents agreed that they sought a prior restraint against Mr. Danks' speech (albeit, in their view, a permissible one). Of course, "*prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.*" *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (emphasis added), and this Court has never upheld any restriction deemed a prior restraint. *See, e.g., Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times v. United States*, 403 U.S. 713 (1971); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *see Procter & Gamble Co.*, 78 F.3d at 227 (stating that the Supreme Court has never upheld a prior restraint).

Even when questions of national security or competing constitutional rights are at stake, the "most extraordinary remedy" of prior restraint is justified "only where the evil that would result from the reportage is both great and certain and cannot be militated [sic] by less intrusive measures." *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (Blackmun, Circuit Justice 1994) (summarizing the Supreme Court's prior restraint jurisprudence).

Here, the "evil" from disclosing the FBI documents is neither "great" nor "certain." It is clear that there is no sufficiently strong government interest to counterbalance infringement of Mr. Danks' First Amendment rights, particularly since the subject of Mr. Danks' speech – alleged governmental misconduct – lies at the core of the First Amendment. *See, e.g., Butterworth v. Smith*, 494 U.S. 624, 632 (1990); *Landmark Communications Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (stating that communication about judicial misconduct lies at the core of the First Amendment).

Moreover, any harm is uncertain because the judges would suffer a legally cognizable injury only if the

allegations in the FBI papers are demonstrably false and published with "actual malice."[6] Finally, it is likely that no harm is prevented at all, since Mr. Danks possesses evidence of serious wrongdoing by the judges independent of the FBI files.[7] Since Mr. Danks has already published both the FBI papers and the information gained from another source, and may publish the information gained from another source again independently of the disciplinary proceeding, a prior restraint would prevent little or no "harm" to the judges' reputations.[8]

Notwithstanding the near *per se* invalidity of prior restraints, the PDJ gave only cursory analysis to the First Amendment issues presented by his order. His First Amendment analysis, *in toto*, consisted of a statement that *Seattle Times* controlled the case, since "but for" the use of

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[6] "Actual malice" in this context means that the speaker published the statement with knowledge that it was false or with reckless disregard of whether it was false or not. *See New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). *See generally In re Green*, 11 P.3d 1078, 1083 (Colo. 2000) (applying *Times v. Sullivan* to attorney discipline cases).

[7] Even if enjoining publication of the FBI files could prevent future harm, First Amendment concerns compel courts to deal with such harm via post-publication defamation actions, rather than pre-publication prior restraints. *See, e.g., Near v. Minnesota*, 283 U.S. 697, 720 (1931) ("[s]ubsequent punishment for such abuses as may exist is the appropriate remedy [for abuse of the liberty of the press], consistent with constitutional privilege"); *Metro. Opera Ass'n v. Local 100*, 239 F.3d 172, 177 (2d Cir. 2001) (stating that "courts have long held that equity will not enjoin a libel" and collecting cases).

[8] Mr. Danks published this information prior to the entry of the PDJ's first order.

discovery by the ORC, Mr. Danks (who was not a party to the case) would not have access to the documents.

The PDJ's Protective Order Constitutes an Unprecedented and Unprincipled Expansion of *Seattle Times v. Rhinehart.*

The PDJ effected a dramatic and unprincipled expansion of *Seattle Times* in three ways: First, he issued a *Seattle Times* protective order governing documents in which Mr. Danks possessed pre-existing First Amendment rights. Second, he applied *Seattle Times* to Mr. Danks even though the PDJ found that Mr. Danks was *not* a party to the proceeding in which the ORC obtained discovery. The PDJ ruled that it was appropriate to apply *Seattle Times* to Mr. Danks, because "but for" discovery by the ORC, Mr. Danks would not have obtained the documents. Finally, the PDJ disregarded the "abuse of discovery" underpinning of *Seattle Times* by applying the case to Mr. Danks, who did not employ discovery and therefore could not have abused it.

The PDJ disregarded the primary limitation on *Seattle Times*, namely that parties to a lawsuit do not have a First Amendment right to discover information from their opponents. *See* 467 U.S. at 32. It follows from this principle that it does not offend the First Amendment to restrict a party's access to discovery materials as a *quid pro quo* for access, since the party has no right to access the materials at all. *See id.* In the instant case, Mr. Danks had already obtained the FBI records (and indeed, had already published them) when Appel and Haeger sought a protective order. Thus, instead of exercising "continuing court control" over Mr. Danks' access to the documents, and imposing a limitation on publication as a *quid pro quo*

for access to information, *see id*, the PDJ placed an *ex post facto* restriction on what Mr. Danks could do with materials already innocently in his possession – materials in which Mr. Danks already had First Amendment rights.

Second, the PDJ dramatically expanded *Seattle Times* by holding that it applies to Mr. Danks, even though he found that Mr. Danks *was not* a party to the proceeding in which the ORC obtained discovery (App., *infra*, 3a). The PDJ held that *Seattle Times* properly applied to Mr. Danks even though he was not a party, because but for the subpoena by the ORC, Mr. Danks would not have obtained the documents at issue.

The PDJ's "but for" causation test dramatically expands *Seattle Times*, since it would justify the application of that case to *anyone* who comes into possession of documents originally obtained via discovery, no matter how far removed from the suit. For example, the PDJ's reading of *Seattle Times* would authorize a restriction on The New York Times or the Denver Post if they were to receive the FBI records from someone two or three persons removed from Mr. Danks. Clearly *Seattle Times* did not contemplate such a result.

Finally, the PDJ disregarded the "abuse of discovery" rationale for *Seattle Times* in holding that *Seattle Times* authorized a protective order against Mr. Danks. *Seattle Times* found that the protective order in that case was justified by the substantial government interest in preventing abuse of discovery. *See* 467 U.S. at 34-36. However, since Mr. Danks did not employ discovery (and indeed was not even a party to the proceeding), there is no way that he could abuse it. Thus, the PDJ improperly relied on this justification in enjoining Mr. Danks' speech.

The PDJ's Order Conflicts with a Long Line of Cases Holding that Courts May Not Recall Information from the Public Domain.

There is a long line of authority holding that courts may not withdraw information from the public domain, even if that information is inadvertently or improperly released. This Court's opinion in *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 311-12 (1977) (per curiam), provides an excellent example of this principle. *Oklahoma Publishing* held that where a petitioner obtained information lawfully and with the state's implicit approval, a restraint on publication of the information so obtained constituted an impermissible prior restraint, even though the law provided that the information in question should remain confidential. *See id. Oklahoma Publishing*, with obvious parallels to the instant case, is not alone. There is a plethora of authority vindicating the same principle. *See, e.g., Procter & Gamble Co.*, 78 F.3d at 225 (prior restraint not justified on publication of lawfully obtained documents, even though those documents were under seal when obtained); *In re Charlotte Observer*, 921 F.2d 47, 50 (4th Cir. 1990) (injunction against revealing name of target of grand jury investigation, issued immediately after the name was inadvertently revealed in open court, is unconstitutional); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) ("[t]he law cannot recall information once it is in the public domain"); *see also, Butterworth*, 494 U.S. at 632 (First Amendment bars penalties for publication of lawfully obtained information); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979) (same).

The PDJ's ruling – which essentially recalled information from the public domain – improperly disregards this authority. The Supreme Court should grant the writ to vindicate the First Amendment principle that

Courts may not withdraw information from the public domain, and to resolve the conflict between the PDJ's ruling and the numerous cases cited above.

CONCLUSION

For the reasons stated above, Petitioner William Danks asks that this Court grant his petition for a writ of certiorari to review the order of the Presiding Disciplinary Judge in this matter.

Respectfully Submitted,

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APPENDIX A – PROTECTIVE ORDER ISSUED BY THE PRESIDING DISCIPLINARY JUDGE

SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 600 17TH STREET, SUITE 510-S DENVER, COLORADO 80202	COURT USE ONLY Case Number: 01PDJ098
In the Matter of the Requests for Investigation of William Charles Danks, filed by Bernie Fay (01-01375) and Attorney Regulation Counsel (01-00964)	
PROTECTIVE ORDER	

This matter is before the Court on the "Petition for Protective Order Pursuant to C.R.C.P. 251.31(e)" filed by Claude W. Appel on October 26, 2001. Filed under seal with the Petition was a copy of an investigative file produced by the Federal Bureau of Investigation ("FBI") pursuant to a subpoena issued by Attorney Regulation Counsel under C.R.C.P. 251.10 (the "FBI Documents"). On October 26, 2001, Petitioner Robert E. Haeger filed a "Joinder in Petition for Protective Order Pursuant to

C.R.C.P. 251.31(e)." (The Petition filed by Claude W. Appel and the Joinder in the Petition filed by Robert E. Haeger are collectively referred to as the "Petition"). On October 29, 2001, in response to the Petition, William C. Danks ("Danks") filed a "Petition for Issuance of Subpoenas and Brief of William C. Danks." Also on October 29, 2001, the Office of Attorney Regulation Counsel filed a response to the Petition.

The Court held a status conference on the Petition and the Responses on October 30, 2001 and directed the parties to file simultaneous briefs in support of their positions. On October 30, 2001, the Court entered a written "Order Re: Interim Protective Order Pursuant to C.R.C.P. 251.10" ("Interim Order"). Briefs were filed by the parties on November 20, 2001. On November 21, 2001, Petitioners and Danks filed Reply Briefs.

A hearing was held on the Petition and the Responses on November 27, 2001. Petitioner Appel was represented by Michael H. Berger. Petitioner Haeger was represented by Jeffrey A. Chase. William C. Danks was present at the hearing and was represented by Alfred T. McDonnell. The Office of Attorney Regulation Counsel was represented at the hearing by Charles E. Mortimer, Jr., Assistant Attorney Regulation Counsel. Deputy Attorney Regulation Counsel Nancy L. Cohen was present during a portion of the hearing.

Upon consideration of the Petition, the FBI Documents, the Responses, the Briefs submitted by the Parties and arguments of counsel, the Court finds and concludes as follows:

1. The Court has jurisdiction over the parties to the Petition and the Responses and the subject matter of

this proceeding pursuant to C.R.C.P. 251.31(e). That Rule provides:

> To protect the interests of a complainant, witness, third party, or respondent, the Presiding Disciplinary Judge or a Hearing Board, may, upon application of any person and for good cause shown, issue a protective order prohibiting the disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted so as to implement the order, including requiring that the hearing be conducted in such a way as to preserve the confidentiality of the information that is the subject of the application.

2. The Subpoena issued by the Office of Attorney Regulation Counsel to the FBI ("Investigative Subpoena") was an investigative subpoena, issued pursuant to C.R.C.P. 251.10. While that rule makes reference to C.R.C.P. 45, C. R. C. P. 251.10 is the controlling rule with respect to the rights and obligations of Attorney Regulation Counsel with respect to the documents produced pursuant to the Investigative Subpoena.

3. The FBI Documents were produced by the FBI pursuant to the Investigative Subpoena.

4. Danks was not a party to any proceeding with respect to the issuance of the Investigative Subpoena and C.R.C.P. 251.10 did not authorize or require Attorney Regulation Counsel to provide to Danks any confidential documents obtained pursuant to the Investigative Subpoena.

5. The FBI Documents, when obtained by Attorney Regulation Counsel from the FBI, were "confidential" within the meaning of C.R.C.P. 251.31 (a) and therefore, Attorney Regulation Counsel had no authority or authorization to provide the documents to Danks or anyone else.[1] The Court rejects the position asserted by Attorney Regulation Counsel that it had the unfettered discretion to determine when something is confidential and when it is not. Such a position is contrary to the provisions of C.R.C.P. 251.31(a), (b), (c) and (d). The investigations of Danks are confidential proceedings pursuant to 251.31(a) unless and until a formal complaint is

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[1] [This footnote is supplied by Petitioner: CRCP 251.31(a), titled "Availability of Information," provides that:

> Except as otherwise provided by these rules, all records, except the work product, deliberations and internal communications of Regulation Counsel, the committee, the Presiding Disciplinary Judge, the Hearing Boards, and the Supreme Court shall be available to the public after the committee determines that reasonable cause to believe grounds for discipline exists and the Regulation Counsel files and serves a complaint as provided in C.R.C.P. 251.14, unless the complainant or the respondent obtains a protective order.
>
> Unless otherwise ordered by the Supreme Court or the Presiding Disciplinary Judge, nothing in these rules shall prohibit the complaining witness, the attorney, or any other witness from disclosing the existence of proceedings under these rules or from disclosing any documents or correspondence served on or provided to those persons.]

filed against and served upon Danks pursuant to C.R.C.P. 251.14.

6. Danks received the documents as the result of an investigative subpoena issued by Attorney Regulation Counsel to the FBI, the production of the documents pursuant to that subpoena, and the subsequent transmittal of a complete copy set of the documents to Danks by Attorney Regulation Counsel under either an agreement to do so between Attorney Regulation Counsel and Danks or under a misapprehension by Attorney Regulation Counsel that it was required and/or authorized to do so.

7. The FBI Documents were obtained by Danks solely through the discovery processes authorized by C.R.C.P. 251. There is no evidence or claim by Danks that Danks obtained the FBI Documents other than through the Investigative Subpoena issued by Attorney Regulation Counsel. Danks has never requested or obtained the FBI Documents under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (West 2001), the Federal Privacy Act, 5 U.S.C. § 552a (West 2001), or under any other federal or state law.

8. In addition to (and independent from) the confidentiality that attaches to the FBI Documents under C.R.C.P. 251.31(a), the FBI Documents are confidential within the meaning of C.R.C.P. 251.31(e) by virtue of federal law. The Court takes judicial notice that a person cannot simply walk into an FBI office and ask to see any or all of the FBI's investigative files and records. Such records are not public records or generally available to the public. Those documents are treated as confidential by the FBI.

9. There was no waiver of the federal confidentiality of the FBI Documents when the FBI

Documents were produced to Attorney Regulation Counsel. First, because there has been no formal request under either the Privacy Act or FOIA, there is no evidence that any federal agency has been afforded any opportunity to review the questioned documents for confidentiality or privilege. Second, the right of confidentiality that arises under FOIA and the Privacy Act were federal statutory rights of the Petitioners as well as the numerous other persons named in the FBI Documents. As a result, the FBI could not and did not cause a waiver of Petitioners' rights to privacy and confidentiality with respect to the FBI Documents.

10. The Court further concludes that a state officer (Attorney Regulation Counsel) cannot waive confidentiality protections granted to citizens by federal law. Therefore, the fact that Attorney Regulation Counsel provided the FBI Documents to Danks does not constitute a waiver of the right of confidentiality belonging to the Petitioners and other persons named in the FBI Documents.

11. The Court does not believe it is required, as part of this proceeding, to make a finding under section 552 (b) (7) (C) of the Freedom of Information Act with respect to whether the disclosure of the FBI Documents "could reasonably be expected to constitute an unwarranted invasion of personal privacy" with respect to the Petitioners and the other persons named in the FBI Documents. However, if such a finding were required as a predicate to the issuance of a protective order in this case, the Court would find that there is a reasonable probability that the disclosure of the FBI Documents "could reasonably be expected to constitute an unwarranted invasion of the personal privacy" rights of Petitioners and the other persons named in the FBI Documents. The Court specifically notes that the FBI and the United States Attorney for the District of Colorado reviewed the FBI Documents and determined that there was no evidence of any wrongdoing. Courts

invariably hold under section 552(b)(7)(C) of FOIA that where there is a finding of no misconduct, that investigative materials relating to the investigation will not be disclosed because that will cause unwarranted invasion of personal privacy rights of the subjects of or persons named in the investigative materials. *Stern v. Federal Bureau of Investigation*, 737 F.2d 84, 89 (D.C. Cir. 1984); *Hunt v. Federal Bureau of Investigation*, 972 F.2d 286, 287 (9th Cir. 1992); *Sherman v. United States Department of the Army*, 244 F.3d 357 (5th Cir. 2001) and *Mueller v. United States Department of the Air Force*, 63 F.Supp.2d 738 (E.D. Va. 1999).

12. The Court rejects Danks' argument that because Danks has already disseminated the FBI Documents to a variety of third persons prior to the issuance of the Interim Protective Order that such actions preclude the issuance of a Protective Order or prospective relief. The Court finds that further dissemination of the FBI Documents by Danks would be wrongful and would cause further harm to the Petitioners and the other persons named in the FBI Documents. Although the Court has no power in the context of this Petition for Protective Order to remedy any harm already caused by Danks' dissemination of the FBI Documents, C.R.C.P. 251.31(e) specifically grants power to the Court to prevent further harm as a result of further dissemination. *See Rugiero v. United States Department of Justice*, 257 P.3d 534 (6th Cir. 2001).

13. Good cause has been shown for the issuance of a Protective Order pursuant to C.R.C.P. 251.31(e). The continued dissemination by Danks of documents which were provided to him by Attorney Regulation Counsel and which are confidential under both state and federal law, poses a significant and substantial risk of harm to the Petitioners, the other persons named in the FBI Documents, the judicial system and the system of justice as a whole.

There is no justifiable reason that the investigation of alleged misconduct by a single lawyer – Danks – should subject the multitude of persons named (as many as 100 persons) in the FBI Documents to public humiliation and ridicule, particularly when the agencies authorized by law to investigate and prosecute violations of federal law have determined that no such violations had occurred. Therefore, good cause exists for the entry of a protective order.

14. A protective order is necessary to protect the interests of Petitioners Appel and Haeger and is also necessary to protect the interests of the judicial system, and all the people whose identities are disclosed in the FBI Documents.

15. The Court rejects Danks' argument that the First Amendment to the United States Constitution and Article II, Section 10 of the Colorado Constitution prohibit the issuance of a protective order in this case. The United States Supreme Court case of *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), and the Colorado Supreme Court case of *Bowlen v. District Court*, 733 P.2d 1179 (Colo. 1987), are controlling on this issue. In *Seattle Times Co.*, the United States Supreme Court held that "where . . . a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict dissemination of the information if gained from other sources, it does not offend the First Amendment." 467 U.S. at 20. The FBI Documents were obtained by Danks solely through the discovery processes authorized by C.R.C.P. 251. The Court has a substantial and compelling interest in controlling the discovery process and preventing "abuse of its process," 467 U.S. at 35. This Court's determination of whether good cause exists for the issuance of a Protective Order provides whatever protections the First Amendment

requires and the issuance of this Protective Order does not constitute an unconstitutional prior restraint.

Upon the foregoing, IT IS ORDERED:

1. The FBI Documents and the information contained therein are confidential within the meaning of C. R. C. P. 251.31(a) and federal law and shall not be further disclosed by Danks, Attorney Regulation Counsel or any other party to this proceeding to any other person or entity without further Order of this Court. The documents in question remain confidential under C.R.C.P. 251.10.

2. This Protective Order expires automatically upon the occurrence of any of the following events:

a. The admission into evidence of the FBI Documents in a public proceeding before this Court, unless this Court enters a further protective order.

b. The admission into evidence of the FBI Documents in any other court or public proceeding provided that the FBI Documents so offered were obtained independently from the production of the documents by the FBI pursuant to the Investigative Subpoena issued by Attorney Regulation Counsel.

3. This Protective Order does not prevent any person acquiring the same information which is contained within the questioned documents from another,

independent source from disclosing such independently obtained information.[2]

4. This Protective Order replaces the Order Re: Interim Protective Order Pursuant to C.R.C.P. 251.10 issued October 30, 2001.

DATED THIS 18th DAY OF DECEMBER, 2001, *nunc pro tunc*, November 27, 2001.

BY THE COURT

Roger L. Keithley,
Presiding Disciplinary Judge

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[2] It has been represented to the PDJ that Danks has filed copies of all or portions of the questioned documents in various courts. Information which is derived from the questioned documents, whether the original set provided to Danks or copies thereof even though previously filed with other courts, falls within the proscriptions of this protective order.

Appendix B

APPENDIX B – ORDER OF THE COLORADO SUPREME COURT DENYING DANKS' PETITION FOR DISCRETIONARY REVIEW OF THE PDJ'S ORDER.

SUPREME COURT, STATE OF COLORADO TWO EAST 14TH AVENUE DENVER, COLORADO 80203 ORIGINAL PROCEEDING IN DISCIPLINE Petition Pursuant to C.A.R. 21	CASE NO. 01SA404
IN RE: In the Matter of the Requests for Investigation of William Charles Danks, filed by Bernie Fay (01-01375) and Attorney Regulation Counsel (01-00964)	
ORDER OF THE COURT	

Upon consideration of the Motion to Seal "Petition Pursuant to C.A.R. 21 for Order to Show Cause Why Order Imposing Prior Restraint on Speech Should Not Be Vacated Forthwith" filed in the above entitled action and matter, and being sufficiently advised in the premises,

Appendix B

IT IS THIS DAY ORDERED that Said Motion to Seal is DENIED and the Petition Pursuant to C.A.R. 21 is DENIED.

BY THE COURT, EN BANC, December 21, 2001
(Mullarkey C.J. and Martinez, J. Not Participating)

Appendix C

APPENDIX C – ORDER OF THE COLORADO SUPREME COURT DENYING DANKS' PETITION for RECONSIDERATION OR TO INTERVENE IN THE ORC'S PETITION FOR DISCRETIONARY REVIEW

SUPREME COURT, STATE OF COLORADO TWO EAST 14TH AVENUE DENVER, COLORADO 80203 ORIGINAL PROCEEDING IN DISCIPLINE Petition Pursuant to C.A.R. 21	CASE NO. 01SA404
IN RE: In the Matter of the Requests for Investigation of William Charles Danks, filed by Bernie Fay (01-01375) and Attorney Regulation Counsel (01-00964)	
ORDER OF THE COURT	

Upon consideration of the Petition for Reconsideration and the Motion For Leave to Intervene in Support of the Office of Attorney Regulation Counsel's Petition Pursuant to C.A.R. 21 and C.R.C.P. 251.1(d) Or, in the Alternative, to File a Cross Petition Seeking Identical

Appendix C

Relief filed in the above entitled action and matter, and being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that Said Petition for Reconsideration and Said Motion for Leave to Intervene or To File a Cross Petition, shall be and the same hereby are DENIED.

BY THE COURT, January 9, 2002